

Interest Analysis, Substantive Law-Making, and the Multistate Case

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I agree with many of Professor Lea Brilmayer's criticisms of both Brainerd Currie and the elaborators of his approach. At the same time, I think that her criticisms may be considerably overstated to the extent that the upshot is that governmental interest analysis is a house without foundations.

Clearly, as Professor Brilmayer seems to admit, what interest analysis is today may be a very different thing from what it was intended to be when Currie first formulated his foundational thesis in the late 1950's. As to the latter, a key question is whether Currie's specific applications of his analysis evidenced merely an overly simplistic approach to the problem of statutory construction (for illustrative purposes or because of lack of a fully worked out theory of statutory interpretation), or, rather, his methodology as applied intentionally masked certain value preferences. It appears to me that Brilmayer's discussion fails to consider expressly both of these possibilities. I tend to believe that the former was the case. Along this line, I should note that while a theory of statutory interpretation can be formulated on the basis of certain substantive policy preferences, it need not be.

Taking Currie's approach for what it expressly purported to be, its foundations cannot possibly be deemed defective. On the contrary, at least outside the choice of law area, few would question the fact that the initial responsibility of a court facing a multistate case is exactly the same as that facing it in a purely domestic one: it must ascertain whether the forum state legislature has directed it to apply a particular rule of decision to the matter before it. An express or implied intent controls the court. An actual intent in the sense that the legislature actually thought about the multistate case need not be present for there to exist a general intent that requires application of a statute outside the purely domestic context. Assuming no federal constitutional limitations prevent the result, the application of a statutory rule even in the case of a true conflict is, when such intent is reliably discoverable, demanded by separation of powers principles. Conversely, if the forum legislature has intended the statutory rule not to apply outside the domestic context, the forum court must obey. In this case, however, it is not always true that the court must look for the applicable rule of discussion in the domestic law of some other state.

In those cases in which the forum court cannot confidently determine the extraterritorial intention of the enacting legislature, the forum court should do what it does in a purely domestic case when the intention of the legislature is not clear: it should assign an *appropriate* meaning to the statute. In the multistate case, the court must consider not only the purpose of the domestic legislation, but also the interests of other states, the expectations of the parties, system-coordinating needs and values, and other relevant factors. Some of these considerations may be equally relevant in

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both the domestic and multistate case. This calculus may result in the conclusion that the domestic statute *should* be construed to supply the rule of decision. On the other hand, it may cause the court to narrow the statute to a purely domestic application. The "moderate and restrained" interpretation step of the Currie analysis allows for narrowing on the basis of at least some of the above mentioned factors.

Having said this, I must admit that I find it somewhat hard to explain Currie's criticism of state legislatures for their adoption of territorialist dogma. There are, however, several possible reasons for this criticism. Legislative adoption of the First Restatement of the Law of Conflict of Laws approach in some statutes could be read by the courts of the state as an implied statement to refrain from analysis of legislative purpose with regard to other statutes when an examination might illuminate a purpose that would require that the statute have extraterritorial application. Alternatively, when a legislature expressly provides choice rules, it speaks to the generality of cases and cannot possibly contemplate all the possible permutations of law and fact that might arise in future multistate cases. Therefore, the application of the legislative choice rules might in some cases substantially undermine the substantive purposes of the domestic legislation. In other words, the courts, on a case-by-case basis in multistate cases, are in the best position to ensure that the legislative purpose of the substantive law is fully carried out, and not unnecessarily undercut by inflexible choice rules.

When dealing with statutory construction, Currie used such terms as "policy," "purpose," and "intent" interchangeably on the apparent assumption that their meanings were self-evident and the same. Clearly they are not. He, as well as courts utilizing interest analysis, seems, in many instances, to use paraphrases of the statutory rule as equivalent to "policy" or "purpose." This technique for determining extraterritorial reach is as conclusory and unhelpful as the reference in the married women's article to the purpose of protecting "Massachusetts women."¹ Yet all this does not suggest to me that Currie intended to use his methodology as a guise for accomplishing some hidden agenda, but rather a relatively unthinking and unsophisticated approach to policy analysis.

Much of Currie's analysis relied on issues where the legislature, rather than the courts, had purported to lay down the rule of decision for purely domestic cases. Even in *Milliken v. Pratt*,² where the disability presumably was purely of common law origin, Currie felt compelled to find legislative sanction for the contract disability.³ Yet even outside the area where statutory directives control expressly or impliedly, it still seems that Currie's basic premise that choice of law should be a matter of construction and interpretation is basically sound. In purely domestic cases the court determines whether a previously announced common law rule of decision should apply to the case before it by determining whether the controversy is sufficiently similar in relevant factors to previously decided cases purporting to stand for the rule that the court, under an obligation to treat like cases in the same fashion, should apply

1. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 85 (1963).

2. 125 MASS. 374 (1878).

3. B. CURRIE, *supra* note 1, at 81.

the rule to the new case. As Currie recognized, there is no reason why a court should approach its task of deciding a multistate case in a different fashion. By definition, in a multistate case the only factual difference from the purely domestic one is the connection of various elements to other states than to the forum state. Thus, the crucial inquiry is whether the extraterritorial nature of these connections justifies a departure from the generally prevailing domestic rule. (I assume here that the forum state may constitutionally prescribe the rule of decision.)

It certainly appears that if, for example, the common law rule was originally designed for deterring certain conduct on the highways or providing compensation, the facts that the accident occurred outside the state, or that the person seeking recovery resides in the forum state, are very rational bases for a presumption either against or in favor of forum law. At the same time, the fact that the originally envisioned purpose might not be served by application of the rule in the multistate case does not necessarily mean that the court cannot decide for the first time in the multistate case that the rule should serve other purposes that suggest its application to the case at bar. For example, in the case of a rule of the road originally designed for deterrence within the forum, the court might defensibly conclude that when it comes to its citizens they should be just as careful outside of the state borders where the citizens might injure nonresidents. Of course, any such determinations are subject to federal constitutional limitations, as Professor Brilmayer suggests.⁴ However, as long as the state court acts within these limitations in formulating a purpose for the rule, it is not irrational or indefensible for a state court to so extend its rule. Unlike the instance when the court is dealing with a forum statute in which the purpose may be imparted by the legislature whose will is supreme, in the common law areas, the court can decide in each case what purpose or purposes should be served by the rule even though the purposes as formulated suggest extraterritorial application. It is true, therefore, that the conclusion that the purposes of a common law rule demand its application to a multistate case is much more of a creative function than Currie expressly seemed to envision. I am still not convinced that any failure to acknowledge this was due to design on his part, but rather due to his failure to think through his basic premises to their logical conclusion.

In short, interest analysis as originally formulated gives no guidance as to why a statutory or common law rule should be seen as extending to multistate cases. However, this does not establish that its foundations are faulty because the logical implication of interest analysis is that courts perform alike in domestic and multistate cases. Any theory proposed to tell a court how to substantively decide a case, domestic or multistate, must be normative in orientation. In contrast, the basic insights of interest analysis relate not to results, but to how to approach a multistate case. To the extent Currie and his followers did have substantive views as to how far rules should extend, they were merely expressing (though perhaps unwittingly) the type of judgments that courts of necessity must express in the common law area, both

4. Brilmayer, *Government Interest Analysis: A House without Foundations*, 46 *Ohio St. L.J.* 459, 473 (1985).

in the domestic and multistate context, when they discard the vested rights and First Restatement mythologies.

Most importantly, in determining similarity of cases, the court is concerned with more than the purpose of the rules at issue. In arriving at the parameters of the rule as applied in purely domestic cases, the court is obviously engaged in a more or less complicated balancing of what it believes to be the relevant considerations. The extraterritorial connections may trigger other and perhaps different considerations which may alter this balance. The interests of other states, interstate interests, party expectations, and other factors are relevant in the multistate case. Thus, the rule applied to the multistate case may differ from that applied to the purely domestic case and even from the rules of all other potentially interested jurisdictions. To the extent that Currie denigrated the balancing of interests, he was guilty of failing to accept the logical result of his insight that the court in the multistate case must proceed in the manner of one facing a purely domestic situation. In fact, as long as the forum court is dealing with a case within the constitutional legislative jurisdiction of the state, it can fashion any rule it sees fit as long as it does not violate equal protection, procedural or substantive due process restrictions, or other constitutional limitations on choice of law. The policies sought to be advanced by the rules of other potentially interested states are merely data for the creative process of fashioning the most suitable rule for the case at hand. Since the forum court is the lawmaker with ultimate authority absent legislative veto, it certainly is just as competent and under just as much an obligation to come up with the best rule of decision as when it faces a purely domestic case. The inquiry should not be which is the better rule but which is the *best* rule.

Finally, I believe that the "restrained and moderate"⁵ interpretation step of the Currie analysis allows for some, but not all, of the relevant considerations applicable to a multistate case to be taken into account. It is difficult to tell for sure because of Currie's lack of exact delineation of how this process was to occur.

Thus, I would conclude that Professor Brilmayer is correct in stating that the ultimate irony of policy analysis of choice of law is that choice decisions are not conceived of as policy decisions.⁶ At the same time, the foundational concept of construction and interpretation represents an indisputably accurate description of what courts can and should do in determining what rule of decision to apply to a multistate case. Currie's problem, as I have said, was his shortsighted failure to follow his premises to their logical conclusions.

It seems to me that any assertion that interest analysis is fundamentally unsound requires establishment that the general process of decision in domestic and multistate cases should differ in significant ways. I simply do not think that Professor Brilmayer's critique does this.

5. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

6. Brilmayer, *supra* note 4, at 480.